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March 24, 2005

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VIA ELECTRONIC MAIL AND REGULAR MAIL

Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-A325
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

Re: TON Services Inc. (Filer ID 819402)
CC Docket No. 96-45
Appeal of Universal Service Administrative Company's Administrator's
Decision on Contributor Appeal, Nov. 8, 2004

Dear Ms. Dortch:

TON Services, Inc. ("TON") hereby responds to the Universal Service Administrative Company's ("USAC's") letter of March 9, 2005 ("*Letter*") in the above-referenced Appeal.

As detailed in TON's Appeal (filed on January 7, 2005), USAC's Decision of November 8, 2004 ("*Administrator's Decision*") denied TON's request for a credit for its overpayment of more than \$400,000 in universal service fees.^{1/} USAC denied TON's request on two distinct grounds. First, USAC found that it could not "*conclusively establish*" whether TON's underlying carriers had remitted to USAC the universal service payments that TON had made to

^{1/} Universal Service Administrative Company, *Administrator's Decision on Contributor Appeal*, Nov. 8, 2004 ("*Administrator's Decision*").

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those carriers, and therefore could not grant TON's claim.^{2/} Second, USAC found that even had it been able to "*determine conclusively*" that the underlying carriers had remitted to USAC the monies paid by TON, USAC itself "lack[s] authority" to grant a credit under these circumstances.^{3/} USAC said that the question of "[w]hether TON can establish double payment and, if so, whether such double payments should be refunded to TON are questions appropriately directed to the [Commission]."^{4/}

In its Appeal, TON asked the Commission to reverse the *Administrator's Decision* and to remand this matter to USAC with instructions (1) to evaluate TON's claim under a preponderance of the evidence standard (rather than the "conclusive" proof standard erroneously applied by USAC) and (2) to provide a credit to TON for any double payments determined to have been made under that preponderance of the evidence standard of proof.

Because of uncertainty regarding the proper forum on appeal, TON dual filed its Appeal with the FCC and USAC. On March 9, 2005, USAC issued its *Letter* providing a "limited response" to TON's Appeal.^{5/} In the *Letter*, USAC agrees with TON that the Commission should decide the substantive issues raised in TON's Appeal. But on the merits of the Appeal, USAC argues that it did not apply a "conclusive proof" standard in its Decision – even as it invites the Commission to require second-tier carriers (such as TON) to establish affirmatively that the third-party underlying carriers paid universal service fees based on the second-tier

^{2/} *Id.* at 2 (emphasis added).

^{3/} *Id.* at 2 (emphasis added).

^{4/} *Id.* at 2.

^{5/} Universal Service Administrative Company, *Letter of Limited Response to TON's Letter of Appeal*, Mar. 9, 2005 at 1 ("*Letter*").

carrier's revenue (by passing along the second-tier carrier's universal service payments). TON addresses USAC's statements below.

First, USAC clearly applied a "conclusive proof" standard in reaching its Decision. The *Administrator's Decision* twice set out this standard: (1) ". . . USAC doubts it could ever establish *conclusively* whether an underlying carrier in fact reported and paid on a particular carrier's revenue" and (2) "Nevertheless, even were we able to determine *conclusively* that TON's underlying carriers had in fact paid USF charges"^{6/} Despite these clear statements, USAC now asserts that the "sole basis" of its Decision was its determination that the FCC, not the Administrator, should decide the question of TON's eligibility for an overpayment credit.^{7/} USAC states that the only purpose of its reference to the "conclusive proof" standard was to illustrate that USAC could not provide the requested relief even if TON were somehow able to make this "conclusive" showing.^{8/} With all due respect to USAC, its statements amount to a confession of error on this point. Even a cursory reading of the *Administrator's Decision* makes plain that the *first* basis of that Decision is that TON cannot *conclusively establish* that its underlying carriers remitted TON's universal service payments to USAC. The Commission should hold that USAC's ruling was in error and that a preponderance of the evidence standard applies in this context.

Second, USAC's position — that a second-tier carrier cannot receive a credit absent direct proof that its payments reached USAC through the underlying carrier — means in practice

^{6/} *Administrator's Decision* at 2 (emphases added).

^{7/} *Letter* at 3.

^{8/} *Id.* at 3.

that the second-tier carrier could rarely, if ever, receive a credit.^{9/} Indeed, while disclaiming reliance on a conclusive proof standard, USAC in the same breath attempts to establish an affirmative proof requirement that would be extremely difficult for the second-tier carrier to meet, *particularly because that carrier has no right of access to the records of either the underlying carriers or USAC*. It is illogical to place this burden on the second-tier carrier when it does not hold the information necessary to prove that the underlying carrier has paid into the universal service fund based on the second-tier carrier's revenue. Once the second-tier carrier proves that it made universal service payments to the underlying carrier, there is simply no reason to presume that those payments ultimately failed to reach USAC,^{10/} nor is there any reason to require the second-tier carrier to prove affirmatively that its payments landed in USAC's hands. Indeed, since the underlying carrier is presumptively required to pay into the universal service fund based on revenue received from the second-tier carrier, it makes no sense to penalize the second-tier carrier (by requiring a double-payment) simply because it cannot provide affirmative proof of the underlying carrier's compliance with that requirement. Accordingly, the only reasonable presumption is that the underlying carrier paid universal service fees based on the second-tier carrier's revenue (or, alternatively stated, that the second-tier carrier's payments to the underlying carrier ultimately reached USAC).

^{9/} See *id.* at 3 ("FCC direction or resolution . . . should address whether . . . asserted double-payors such as TON, should be eligible for USF credits for claimed double payments without evidence that the asserted double-payee (the underlying carrier) has actually contributed to the USF based upon the revenue of the double-payor."). USAC lacks the authority to engage in such "back door" advocacy. Its enabling regulations provide that it may "advocate positions before the Commission and its staff *only* on administrative matters relating to the universal service support mechanisms." 47 C.F.R. § 54.702(d) (emphasis added).

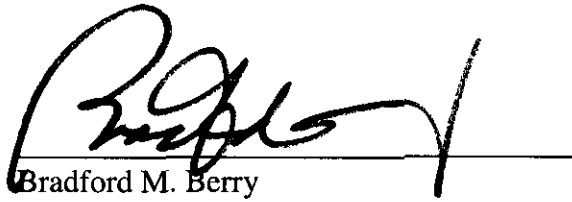
^{10/} Even if a dispute arises as to the underlying carrier's payments, the presumption still should be in favor of the second-tier carrier unless the dispute relates directly to the question of whether the underlying carrier paid universal service fees based on the revenue of the second-tier carrier.

Finally, although TON should not be required to present *direct* evidence that its payments reached USAC, USAC did not provide TON with an opportunity to present *circumstantial* evidence on that point. USAC's Letter incorrectly states that "TON does not claim to be able to offer evidence of the underlying carriers' ultimate contributions to the USF based on TON's revenue."^{11/} To be sure, no second-tier carrier could ever prove "conclusively" that the same dollars it paid to the underlying carrier as universal service payments were ultimately remitted to USAC. But TON could have pointed to the absence of universal service enforcement actions against its underlying carriers, the absence of any public issue as to whether those carriers paid universal service fees based on TON's revenue, and possibly even letters or affidavits indicating that TON's universal service payments to the underlying carriers were properly applied and remitted to USAC. The Commission should not require such additional affirmative proof of TON, which has already demonstrated that it made more than \$400,000 in universal service payments to its underlying carriers. But in the event the Commission concludes that additional proof is required under these circumstances, TON should be afforded the opportunity to present such proof.

Accordingly, as stated in its Appeal, TON respectfully requests that the Commission reverse USAC's determinations (1) that USAC lacks the authority to grant TON's request for a credit of any overpayment found to have been made; and (2) that conclusive proof is the applicable evidentiary standard governing TON's request. TON further respectfully requests that the Commission remand this case to USAC for further consideration of TON's request in light of the Commission's ruling.

^{11/} Letter at 3.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Bradford M. Berry', is written over a horizontal line.

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March 24, 2005

cc: Universal Service Administrative Company